Toh Ang Poo (t/a Poo Wah Enterprise) v Jasin Construction Development (M) Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(NCVC)(W)-263–01 OF 2013
MOHD HISHAMUDIN YUNUS, ABDUL AZIZ ABD RAHIM AND MOHAMAD ARIFF JJCA
7 NOVEMBER 2013

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Civil Procedure — Appeal — Appeal against judgment of the High Court — Decision of trial judge — Claim for breach of contract — Defects in sewerage works — Findings of trial judge on liability and quantum of damages — Whether appropriate — Whether facts duly considered

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Civil Procedure — Damages — Special damages — Claim for breach of contract — Defects in sewerage works — Appeal against decision of High Court in allowing claim — Whether damages allowed appropriate

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The respondent ('the plaintiff') was the main contractor of a project known as the 'Proposed Site Clearing and Earthworks for Zone 33A and Kulai Garden, Indahpura, Mukim of Senai-Kulai, District of Johor Bahru' ('the project'). Pursuant to a letter of award, the plaintiff appointed the defendant as its subcontractor to carry out sewerage works for the project. The consultant engineer issued the defendant with a certificate of practical completion ('the CPC') on 22 November 2006. The alleged defective works appeared sometime in November 2007 and the defendant admitted receiving the plaintiff's complaint letter dated 21 November 2007 which was within the defect liability period. The plaintiff contended that it suffered loss and damages as a result of the defendant's defective sewerage works and proceeded to claim for the costs of rectification amounting to RM614,169.80. However, the defendant denied that there were defects and asserted that, if at all there were defects, they had been made good during the defect liability period. The High Court allowed the plaintiff's claim for damages for breach of contract, against the defendant. Hence, the present appeal.

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Held, allowing the appeal with costs; setting aside the order of High Court:

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(1) The decision of the High Court judge was against the weight of evidence. The findings of the trial judge on liability and quantum of damages were erroneous. The High Court judge failed to give due consideration to the fact that the defendant had been issued by the consultant engineer with a CPC on 22 November 2006. The High Court judge failed to appreciate

A the fact that the plaintiff had failed to prove that the pipes laid by the defendant leaked during the defect liability period (see paras 17–18, 22 & 28).

(2) The plaintiff had certified all of the defendant's works and had made full payment to the defendant. The plaintiff would not have made full payment had they been not satisfied with the defendant's works. The plaintiff's letter of complaint was also vaguely worded (see paras 19–20).

(3) The High Court judge failed to consider that the plaintiff's allegation, that the manholes were constructed without the cast in-situ concrete surrounds, was highly improbable. The complaint letter made no mention of the particular alleged 'defect'. Moreover, the consultant engineer had issued the CPC. If the cast in-situ concrete surrounds were left undone for the manholes, such omissions would not have been described as 'defects'; that would have been serious omissions, incomplete works. The consultant engineer had carried out an inspection of the works before issuing the CPC. The omissions, if indeed there were such omissions, would have been too glaring to be overlooked. The consultant engineer would have noticed the omissions and would not have issued the CPC. The plaintiff had not alleged that the consultant engineer had been careless, negligent or dishonest in issuing the CPC (see para 24).

(4) The plaintiff had alleged that the defendant had failed to carry out works on the pipes. There was no credible evidence of such failure. On the contrary, there was evidence that the 'ball test' was successfully carried out by the plaintiff, which showed that the pipes were laid in a proper gradient and there was no blockage; and that water was able to flow unhindered from one end of the pipe to the other end (see para 25).

(5) The amount claimed by the third party tasked with the rectification works was exorbitant. The amount claimed by the third party for the rectification works was RM614,169.80, but the contract sum for the sewerage works between the plaintiff and the defendant was only RM296,695.60 (see para 27).

[Bahasa Malaysia summary

Responden ('plaintif') adalah kontraktor utama untuk projek dikenali sebagai 'Proposed Site Clearing and Earthworks for Zone 33A and Kulai Garden, Indahpura, Mukim of Senai-Kulai, District of Johor Bahru' ('projek'). Menurut surat award itu, plaintif telah melantik defendan sebagai subkontraktor untuk menjalankan kerja pembentungan untuk projek itu. Jurutera perunding telah mengeluarkan sijil akuan siap amali ('SASA') kepada defendan pada 22 November 2006. Kerja-kerja defekif yang dikatakan kelihatan sekitar November 2007 dan defendan mengakui telah menerima surat aduan plaintif bertarikh 21 November 2007 yang mana adalah dalam

tempoh liabiliti kecacatan. Plaintif berhujah bahawa ia mengalami kerugian dan kerosakan akibat pembentungan defektif defendan dan meneruskan tuntutan untuk kos pembaikan berjumlah RM614,169.80. Walau bagaimanapun, defendan menafikan terdapat apa-apa kecacatan dan menegaskan bahawa, jikapun terdapat kecacatan, ia telah diperbaiki dalam tempoh liabiliti kecacatan itu. Mahkamah Tinggi membenarkan tuntutan plaintif untuk ganti rugi atas pelanggaran kontrak, terhadap defendan. Justeru, rayuan ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Keputusan hakim Mahkamah Tinggi adalah terhadap beban keterangan. Penemuan hakim pebicaraan tentang liabiliti dan kuantum kerosakan adalah salah. Hakim Mahkamah Tinggi gagal untuk memberi pertimbangan berhubung fakta bahawa defendan telah dilantik oleh jurutera perunding dengan SASA pada 22 November 2006. Hakim Mahkamah Tinggi gagal menghargai fakta bahawa plaintif telah gagal membuktikan paip-paip yang dipasang oleh defendan bocor semasa dalam tempoh liabiliti kerosakan itu (lihat perenggan 17–18, 22 & 28).

(2) Plaintif telah mengesahkan semua kerja defendan dan membuat bayaran penuh kepada defendan. Plaintif tidak mungkin membuat bayaran penuh jika tidak berpuas hati dengan kerja defendan. Surat aduan plaintif juga ditulis dengan perkataan samar-samar (lihat perenggan 19–20).

(3) Hakim Mahkamah Tinggi gagal mengambil kira yang pengataan plaintif, bahawa lurang pembentungan dibina tanpa acuan *in-situ* konkrit sekeliling, adalah sangat mustahil. Surat aduan iu tidak menyebut tentang 'kecacatan' tertentu yang dikatakan. Bahkan, jurutera perunding itu telah mengeluarkan SASA itu. Jika acuan *in-situ* konkrit sekeliling itu dibiarkan tidak dibaiki menjadi lurang pembentungan, peninggalan tersebut tidak boleh digambarkan sebagai 'kecacatan'; ia merupakan peninggalan serius, kerja yang tidak siap. Jurutera perunding telah menjalankan pemeriksaan kerja sebelum mengeluarkan SASA. Peninggalan tersebut, jika benar berlaku peninggalan, pasti agak ketara untuk diabaikan. Jurutera perunding pasti perasan peninggalan itu dan tidak mengeluarkan SASA itu. Plaintif tidak mengatakan bahawa jurutera perunding telah lalai, cuai atau tidak jujur dalam mengeluarkan SASA itu (lihat perenggan 24).

(4) Plaintif mengatakan bahawa defendan telah gagal menjalankan kerja-kerja ke atas paip. Tiada keterangan yang boleh dipercayai yang menunjukkan kegagalan itu. Sebaliknya, terdapat keterangan bahawa 'ball test' berjaya dilaksanakan oleh plaintif, yang menunjukkan bahawa paip-paip itu telah dipasang pada kecerunan yang betul dan tiada

sekatan; dan bahawa air dapat mengalir tanpa halangan dari satu hujung paip ke hujung satu lagi (lihat perenggan 25).

(5) Jumlah yang dituntut oleh pihak ketiga yang ditugaskan untuk kerja-kerja pembaikan adalah terlalu tinggi. Jumlah yang dituntut oleh pihak ketiga untuk kerja-kerja pembaikan adalah RM614,169.80, jumlah untuk kerja pembentungan antara plaintif dan defendan hanya RM296,695.60 (lihat perenggan 27).]

Notes

For cases on appeal against judgment of the High Court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 800–803.

Appeal from: Civil Suit No 23-NCVC-221–12 of 2011 (High Court, Johor Bahru)

Edwin Lim (SK Song) for the appellant.
KP Ng (Jamie Tan with him) (Yoong & Partners) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] This appeal is against the decision of the High Court of Johor Bahru given on 6 December 2012.

[2] The High Court, after a full trial, had allowed the respondent's/plaintiff's ('the plaintiff) claim against the appellant/defendant ('the defendant') for damages for breach of contract.

[3] The nature of the alleged breach is defective sewerage works. For this alleged breach, the plaintiff claims special damages in the sum of RM614,169.80. This claim was allowed by the High Court.

[4] Hence, the appeal to this court.

[5] On 14 May 2013,we, unanimously, allowed the appeal with costs. We set aside the order of the High Court.

[6] We, now give our grounds.

[7] In allowing the appeal, we are of the view that the decision of the learned High Court judge was against the weight of evidence.

[8] The plaintiff was the main contractor of a project known as 'Proposed Site Clearing and Earthworks for Zone 33A and Kulai Garden, Indahpura,

Mukim of Senai-Kulai, District of Johor Bahru ('the project'), for Asiatic Land Development Sdn Bhd'. The employer of the project ('the developer') was a company called Asiatic Land Development Sdn Bhd. The project manager was a company called Kien Huat Development Sdn Bhd.

[9] Pursuant to a letter of award dated 28 March 2006, the plaintiff, as the main contractor, appointed the defendant as its subcontractor to carry out sewerage works for the project. The salient terms as stipulated in the letter of award are:

(a) the subcontract was for a provisional sum of RM296,695.60;

(b) the commencement and site possession date was 15 April 2006;

(c) the completion date of the works was 15 July 2006; and

(d) the defect liability period is 18 months after practical completion of the works.

[10] The defendant carried out the works.

[11] The consultant engineer (Dr YG Tan Jurutera Perunding Sdn Bhd) issued the defendant with a certificate of practical completion ('the CPC') on 22 November 2006.

[12] The alleged defective works appeared sometime in November 2007. The defendant admitted receiving the plaintiff's complaint letter dated 21 November 2007.

[13] This complaint was within the defect liability period.

[14] The defect liability period ended on 21 April 2008.

[15] The plaintiff contends that it has suffered loss and damages as a result of the defendant's defective sewerage works. The plaintiff's claim is for the costs of rectification amounting to RM614,169.80. The plaintiff had to engage a third party, Xiangyang Construction, to carry out the rectification works. The defective works were, inter alia, as follows:

(a) the defendant had completed all the chambering manhole without the cast in-situ concrete surrounds;

(b) the defendant failed to maintain and desilt the sewerage pipes and manholes; and

(c) the piping work, earthwork, settlement and sewerage manhole were not according to the design level.

[16] The defendant denies that there were defects; and asserts that, if at all there were defects, they had been made good during the defect liability period.

[17] We hold that the decision of the High Court judge was against the weight of evidence for the following reasons.

[18] First, the learned High Court judge failed to give due consideration to the fact that the defendant had been issued by the consultant engineer with a CPC on 22 November 2006.

[19] Second, the plaintiff had certified all of the defendant's works and had made full payment to the defendant. The plaintiff would not have made full payment had they been not satisfied with the defendant's works.

[20] Third, the plaintiff's letter of complaint of 21 November 2007 was vaguely worded. What is meant by:

> … your piping work, earthwork settlement and sewerage manhole need to be adjusted as per design level?

[21] This letter is, obviously, lacking in essential particulars.

[22] Fourth, the learned High Court judge failed to appreciate the fact that the plaintiff had failed to prove that the pipes laid by the defendant leaked during the defect liability period. The evidence of Daniel Tan ('PW3'), the plaintiff's project manager and Lee Kim Meow ('PW2'), the developer's clerk of works on the alleged leakages were speculative and inconclusive in nature, as they did not carry out any acceptable tests to determine the existence of leakages during the defect liability period. The plaintiff appointed a third party contractor to conduct the CCTV tests on the pipes only after the expiry of the defect liability period (it is to be recalled that that the defect liability period ended on 21 April 2008), that is to say, on 9 September 2008, 15 September 2008, 22 October 2008, 15 November 2008, 19 December 2008 and 22 December 2008. Therefore, the following finding on corroboration of evidence by the learned trial judge is, with respect, erroneous:

> The evidence of Daniel Tan and Lee Kim Meow relating to the defective works were corroborated by Harman who prepared CCTV tests and reports and carried out patch repair works on the underground pipes.

[23] Harman ('PW1') was the director of a third party company called 'Al Pine Services Sdn Bhd' engaged by the plaintiff to ascertain the existence of leakages in the pipes laid by the defendant. As the first inspection (out of the six inspections) was done by Harman only five months (on 9 September 2008)

after the expiry of the defect liability period, the evidence of PW1 adduced with the view that leakages occurred during the defect liability period, is of no probative value, and hence could not have corroborated the evidence of Daniel Tan ('PW3') and Lee Kim Meow ('PW2'). But, actually, as we see it, the question of corroboration does not arise as the evidence of PW2 and PW3 on the leakages, is, in the first place, hardly of any probative value since they are not experts on the matter (on the detection of leakages of underground pipes).

[24] Fifth, the learned High Court judge failed to consider that the plaintiff's allegation, that the manholes were constructed without the cast in-situ concrete surrounds, is highly improbable. This is because the complaint letter of 21 November 2007 makes no mention of this particular alleged 'defect'. Moreover, the consultant engineer had issued the CPC on 22 November 2006. If the cast in-situ concrete surrounds were left undone for the manholes, such omissions would not have been described as 'defects': that would have been serious omissions, incomplete works. The consultant engineer had carried out an inspection of the works before issuing the CPC. The omissions, if indeed there were such omissions, would have been too glaring to be overlooked. The consultant engineer would have noticed the omissions and would not have issued the CPC.The plaintiff has not alleged that the consultant engineer had been careless, negligent or dishonest in issuing the CPC.

[25] Sixth, the plaintiff alleges that the defendant had failed to carry out desilting works on the pipes. There is no credible evidence of such failure. On the contrary, there is evidence that the 'ball test' was successfully carried out by the plaintiff, which shows that the pipes were laid in a proper gradient and there was no blockage; and that water was able to flow unhindered from one end of the pipe to the other end.

[26] Seventh, there are material discrepancies in the dates in the certificates of payment issued by the plaintiff, namely, certificate of payment No 1, certificate of payment No 2 and certificate of payment No 3. Just to take one example: certificate No 3 is dated 16 May 2009; but certificate No 1 was certified later on 17 August 2009. In the light of these material discrepancies, plus the fact that the plaintiff failed to call or to ask the persons signing and approving the certificates to explain the discrepancies, the credibility of these certificates is highly suspect.

[27] Finally, and related to the preceding issue of discrepancies in the certificates of payment, the amount claimed by the third party tasked with the rectification works was exorbitant. The amount claimed by the third party for the rectification works is RM614,169.80, but the contract sum for the sewerage works between the plaintiff and the defendant is only RM296,695.60. Yet the plaintiff's second witness ('PW2') testified that the

A defendant's defect works were only 'at most 30%'. The third party was not called by the plaintiff to explain this exorbitant sum claimed by them.

[28] Considering the above reasons and applying the balance of probabilities test, we are of the view that the findings of the learned trial judge on liability and quantum of damages were erroneous.

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Appeal allowed with costs.

C Reported by Afiq Mohamad Noor

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